



Commonwealth of Massachusetts State Ethics Commission

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SUFFOLK, ss.

**COMMISSION ADJUDICATORY
DOCKET NO. 597**

**IN THE MATTER
OF
BRIAN J. MARTIN**

DISPOSITION AGREEMENT

This Disposition Agreement ("Agreement") is entered into between the State Ethics Commission ("Commission") and Brian J. Martin ("Martin") pursuant to Section 5 of the Commission's Enforcement Procedures. This Agreement constitutes a consented-to final order enforceable in the Superior Court, pursuant to G.L. c. 268B, §4(j).

On September 3, 1998, the Commission initiated, pursuant to G.L. c. 268B, §4(a), a preliminary inquiry into possible violations of the conflict of interest law, G.L. c. 268A, by Martin. The Commission has concluded the inquiry and, on November 17, 1999, found reasonable cause to believe that Martin violated G.L. c. 268A, §23(b)(3).

The Commission and Martin now agree to the following findings of fact and conclusions of law:

1. Martin is the Lowell city manager. Martin was appointed to this full-time, salaried position by the Lowell City Council ("City Council") in August 1995. Martin was a Lowell assistant city manager from 1989 to August 1995 and a Lowell city councillor from 1981 until 1989. In 1984 and 1985, Martin was Lowell's mayor.
2. As Lowell city manager, Martin is the city's chief executive officer. As such, Martin is the awarding authority for city contracts.
3. Lowell has four municipal public parking garages and one municipal public parking lot. The city contracts with a private security company for security at its public parking facilities. Under the contract for security services for Lowell's public parking facilities ("the security contract"), the security company provides uniformed security guards to patrol the city's public parking facilities for a specified number of hours per week, according to the agreed daily schedule for each garage. During the period here relevant, none of Lowell's public parking facilities had full-time, i.e., 24-hours-per-day-seven-days-per-week, security.
4. Since 1978, Lowell Municipal Parking Garage Administrator A.L. "Ed" Trudel ("Trudel") has had responsibility for supervising the municipal parking facilities' security provider. Until 1996, Trudel was the city official who recommended to the city manager which security company should be hired. Until 1996, Trudel used an invitation to bid process to select the lowest responsible and responsive bidder to recommend to the city manager for the award of the security contract.^{1/} In 1990 and again in 1993, Trudel selected Reliable Security Guard Agency, Inc. ("Reliable") of Salem, New Hampshire, pursuant to an invitation to bid process, to recommend to the city manager, and Reliable was awarded the security contract for three-year periods respectively ending June 30, 1993 and June 30, 1996.^{2/}

5. In February 1996, because the security contract was then coming due to be rebid for a new three-year period, Trudel sent a draft of a proposed invitation to bid for the contract to the Lowell city solicitor's office for review. After discussion with City Solicitor Thomas E. Sweeney ("Sweeney"), Martin directed Trudel to use a request for proposal ("RFP") process for the security contract instead of the invitation to bid process.^{3/} Because Martin chose to have the RFP process used, Martin subsequently was not bound by G.L. c. 30B, §5 to award the security contract to the lowest bidder, but instead was permitted under G.L. c. 30B, §6 to award the contract to an offerer who did not submit the lowest price proposal.^{4/}

6. In early April 1996, the city issued an RFP for the security contract and Martin appointed a committee of five persons, with Trudel as chairman, to review the security contract proposals and select a security company to recommend to Martin for the award of the security contract.

7. At all times here relevant, Francis J. Elliott ("Elliott") and Raymond F. Ralls ("Ralls") were the owners and officers of National. During the relevant period, the security company operated from offices at 131 East Merrimack Street, Lowell.

8. At all times here relevant, Martin was friends with Elliott and Ralls.^{5/} In 1996, Martin, Ralls and Elliott were all longtime members of the Lowell YMCA. Martin, Martin's father (also a longtime Lowell YMCA member), Ralls and Elliott played handball together at the YMCA for a number of years and had, as of 1996, known each other for many years. This YMCA membership and handball connection existed and remained intact throughout 1996. Additionally, in the early 1990s, Martin, his late brother (who was then ill), Ralls and several other persons traveled together to Atlantic City, New Jersey, where they visited several casinos. Also in the early 1990s, Martin, his father, and several other persons traveled together to Foxwoods casino ("Foxwoods") in Connecticut to celebrate Martin's father's birthday and Ralls, who was at Foxwoods, joined the celebration.

9. In early April 1996, Martin made a day trip to Foxwoods with Ralls and Elliott and two or three other persons. The group traveled together in a rented limousine. Martin paid his own expenses for the day trip. Martin paid for his share of the cost of the limousine at National's Lowell headquarters the day after the trip.

10. In May 1996, the security contract RFP committee was unable to decide to whom the contract should be awarded.^{6/} The RFP committee opened the proponents' price proposals^{7/} prematurely in violation of G.L. c. 30B. Trudel informed City Solicitor Sweeney of this situation and Sweeney advised Trudel to cancel the RFP. Thus, the first security contract RFP fell through.

11. On or about May 29, 1996, after discussion with Sweeney, Martin informed Lowell Police Superintendent Edward F. Davis, III ("Davis") that Martin was assigning the Lowell police department ("police department") the task of selecting a security company to recommend to Martin pursuant to a new security contract RFP. Davis, in turn, delegated the security contract RFP responsibilities to Captain Chauncy E. Normandin ("Normandin").

12. The second security contract RFP was issued on or about July 13, 1996 and then reissued on or about August 3, 1996, apparently because the July RFP was not properly

published. Four security companies, including Reliable and National, submitted proposals at the police department on August 28, 1996.

13. In or about early July 1996, Davis was asked for documentation of vandalism and theft in the municipal parking garages during Reliable's tenure as the garage security contractor.^{8/} Davis in turn asked Normandin to obtain such documentation from existing police records. When Normandin reported to Davis that there were no existing police reports of vandalism and theft in the garages, Davis asked Normandin to obtain vandalism and theft documentation from the head of the police department's narcotics bureau, Lt. William Busby ("Busby").^{9/}

14. On July 17, 1996, Busby wrote a memorandum to Davis concerning vandalism and theft at the Ayotte Garage where the police department then had two fenced lots for impounded vehicles. Busby's memorandum referred only to the Ayotte Garage and generally described vandalism and theft involving several vehicles over a one and one half year period, but did not give any specifics as to when the vandalism and theft occurred.^{10/} The memorandum further stated Busby's opinion that the then current garage security company (Reliable) was not providing the services for which it was being paid.^{11/}

15. As of July 17, 1996, the police department had never complained to Reliable about vandalism and theft at the Ayotte Garage. Nor had the police department ever complained to Trudel or to Martin or to anyone else in the city administration about Reliable's performance. While apparently certain vehicles parked in the Ayotte Garage had been vandalized and items had been stolen from parked vehicles, the police department had, as of July 17, 1996, made no effort to determine whether the vandalism and thefts had occurred while Reliable employees were on duty and, thus, whether the vandalism and thefts were in fact attributable to any failure by Reliable to adequately perform its duties under the security contract.^{12/}

16. On September 11, 1996, Normandin sent Martin his evaluations of the RFP proponents. Normandin: (1) disqualified one proponent as "non-responsive", (2) found one proponent to be only "advantageous", and (3) found two proponents, Reliable and National, each to be "highly advantageous." Along with his evaluations and reference checks done by a fellow police officer,^{13/} Normandin provided Martin with a copy of Busby's July 17, 1996 memorandum.

17. Upon receiving from Normandin the evaluations, references and Busby's July 17, 1996 memorandum on September 11, 1996, Martin did not make any effort to determine whether Reliable was in fact responsible for the vandalism and theft reported in the Busby memorandum. For example, Martin did not ask the police department why it had not previously complained about Reliable's performance. Martin also did not discuss the Busby memorandum with Normandin, Davis or Busby. Nor did Martin ask Trudel, the city official with the greatest knowledge of Reliable's job performance, whether there was a vandalism problem in the city parking garages.^{14/ 15/}

18. On September 13, 1996, Martin awarded the security contract to National. Martin's award decision was explained in a September 13, 1996 public document entitled "Report of Awarding Authority." According to the report, the security contract was awarded to National (despite Reliable's lower price proposal)^{16/} due to "substandard performance" by Reliable, citing incidents of vandalism to and thefts from vehicles at the Ayotte Garage as described in

Busby's July 17, 1996 memorandum. Also on September 13, 1996, Martin by letter to Elliott notified National of the security contract award to National. A letter of the same date informed Reliable of the award to National.

19. Reliable protested the security contract award to National to the state Inspector General. This protest delayed the formal award of the security contract to National and the execution of the contract between National and Lowell for nearly two months.

20. The Inspector General asked for an explanation of the award of the security contract to National. In response, on September 30, 1996, Sweeney provided the Inspector General with a copy of the September 13, 1996 Report of the Awarding Authority. On November 6, 1996, Sweeney advised the Inspector General that during Reliable's last three years of service under the security contract there had been ninety acts of vandalism or theft reported in the city parking garages, of which twenty-three acts had occurred while Reliable was apparently on duty.^{17/} Having received this explanation, the Inspector General took no action concerning the award of the security contract to National.^{18/}

21. On November 8, 1996, the city and National executed a contract for garage security services through June 30, 1999.^{19/} The contract was signed by Martin, Sweeney and City Auditor James T. Kennedy on behalf of the City of Lowell and by Elliott on behalf of National.

22. At no time during the security contract RFP and award process did Martin disclose to his appointing authority, the City Council, that he was longtime friends with the owners of National and had made trips with them to Foxwoods and Atlantic City. Nor did Martin, prior to or at the time of the award of the security contract, disclose to the City Council that he was awarding the security contract to National despite the fact that National's price proposal was, by a substantial margin, not the lowest submitted in response to the RFP. Finally, Martin did not, prior to or at the time of the award of the security contract, disclose to his appointing authority his basis for not awarding the security contract to Reliable, the company that submitted the lowest price proposal.^{20/}

23. On February 19, 1997, Reliable filed suit against Lowell in Middlesex Superior Court alleging bad faith by the city in awarding the security contract to National. The complaint alleged that Martin favored National in the award of the contract because of his personal relationship with the company's owners. The case was settled in April 1999. Lowell, without admitting liability, paid Reliable nearly \$70,000 to settle the lawsuit.

24. As Lowell city manager, Martin is a municipal employee as defined in G.L. c. 268A, §1. As such, Martin is subject to the provisions of the conflict of interest law, G.L. c. 268A.

25. General Laws chapter 268A, §23(b)(3), in relevant part, prohibits a municipal employee from, knowingly or with reason to know, acting in a manner which would cause a reasonable person having knowledge of the relevant circumstances, to conclude that any person can improperly influence the employee or unduly enjoy the employee's favor in the performance of the employee's official duties, or that the employee is likely to act or fail to act as the result of kinship, rank, position or undue influence of any part or person. Section 23(b)(3) further provides, as to appointed employees such as Martin, that "[i]t shall be unreasonable to so conclude if such officer or employee has disclosed in writing to his appointing authority... the facts which would otherwise lead to such a conclusion."

26. Martin, by awarding the security contract to National, a company owned by two of his friends with whom he had made trips to Foxwoods and Atlantic City, particularly where National's price proposal was, by a substantial margin, not the lowest one submitted and where, under the above-stated circumstances, the expressed basis for rejecting the lowest price proposal was questionable,^{21/} knowingly acted in a manner which would cause a reasonable person with knowledge of the relevant circumstances to conclude that National's owners Ralls and Elliott could improperly influence Martin or unduly enjoy Martin's favor in the performance of his official duties as city manager. In so doing, Martin violated §23(b)(3).^{22/}

In view of the foregoing violation of G.L. c. 268A by Martin, the Commission has determined that the public interest would be served by the disposition of this matter without further enforcement proceedings, on the basis of the following terms and conditions agreed to by Martin:

(1) that Martin pay the Commission the sum of one thousand seven hundred and fifty dollars (\$1,750.00) as a civil penalty for violating G.L. c. 268A, §23(b)(3);^{23/} and

(2) that Martin waive all rights to contest the finding of fact, conclusions of law and terms and conditions contained in the Agreement in this or any related administrative or judicial proceedings to which the Commission is or may be a party.

DATE: November 18, 1999

^{1/}Pursuant to G.L. c. 30B, §5, where the invitation for bids process is used, the contract must be awarded to the "lowest responsible and responsive bidder."

^{2/}Reliable submitted a lower bid than the other bidders, including a Lowell-based security company, National Security Protective Services, Inc. ("National"). National had held the security contract in the late 1980s, but was terminated by Trudel in November 1988 prior to the end of the three-year contract period.

^{3/}Martin had received complaints about the invitation to bid process from prior unsuccessful bidders on the security contract. Martin discussed the complaints with Sweeney, who advised Martin that the RFP process could be used and that a contract could be awarded to a company not submitting the lowest price proposal. Sweeney also advised Martin that Martin needed a good reason for by-passing the lowest bidder and that the reason had to be stated in writing.

^{4/}Under G.L. c. 30B, §6, when the RFP process is used, the contract may be awarded to the offeror who did not submit the lowest price provided that "the chief procurement officer shall explain the reasons for the award in writing, specifying in reasonable detail the basis for determining that the quality of supplies or services under the contract will not exceed the governmental body's actual needs."

^{5/}Martin, Ralls and Elliott all testified that Martin is friends with Ralls and Elliott; none testified, however, that Martin is particularly close friends with either Ralls or Elliott.

6/Both Reliable and National were among the security companies which submitted proposals in response to the April 1996 security contract RFP. The committee split between those members favoring Reliable and those favoring National.

7/Reliable's price proposal was lower than National's.

8/According to Davis, the request came from Lowell City Hall. Also according to Davis, he cannot recall specifically from whom he received the request, but his best recollection is that it came from either Martin or Sweeney. Sweeney denies that he or anyone in the city solicitor's office made the request. According to Martin, he has no recollection of discussing garage vandalism and theft with Davis or of asking Davis for documentation of such vandalism and theft. Based upon its investigation, the Commission concludes that Martin requested the garage vandalism and theft documentation.

9/Prior to becoming police superintendent, Davis had been head of the narcotics bureau.

10/These acts of vandalism and theft had not been made the subjects of police reports and thus no record of the dates and times of the acts existed at the time Busby wrote his memorandum.

11/During the relevant period, the Ayotte Garage was, pursuant to the security contract, not guarded by Reliable on a full-time (24-hours-per-day-seven-days-per-week) basis. Busby testified that he was not aware of this fact in July 1996. Busby testified that, at the time of his memorandum to Davis, he did not park in the Ayotte Garage, had never read the security contract, had never spoken with any security company employees about garage security, and did not know the name of the then current security company. Busby further testified that he would not have stated in his July 17, 1996 memorandum that the security company was not providing the services for which it was being paid had he known that the company was not contractually required to provide full-time security at the Ayotte Garage.

12/In the Commission's view, the police department's failure to complain to Reliable or the city administration about the Ayotte Garage vandalism and thefts indicates that the police department either did not consider the vandalism and thefts to be significant or did not consider Reliable to be responsible for the problems at the Ayotte Garage.

13/Reliable's references were favorable, as were those of National.

14/Based upon its investigation, the Commission concludes that had Martin asked Trudel, Trudel would have informed Martin that Reliable's performance was satisfactory and that, based upon Trudel's years of experience with Lowell's public parking facilities, the amount of theft and vandalism which occurred in the garages did not exceed the amount which is, as a practical matter, unavoidable in such facilities.

15/Martin maintains that under G.L. c. 30B, §6, he was only required to explain his reasons for the security contract award in writing, which, in Martin's view, he did on September 13, 1996, as described *infra* in paragraph 18. The Commission makes no finding as to whether Martin complied with G.L. c. 30B. In any case, Martin's purported compliance with the specific requirements of G.L. c. 30B, §6, did not avoid his violation of the conflict of interest law, G.L. c. 268A, as set forth in this Agreement.

16/On its face, Reliable's price proposal was \$148,397.33 lower than National's because National had mistakenly based its price on a full three-year contract period whereas Reliable had properly based its price on the less than three-year period stated in the August RFP. In fact, Reliable's price was about \$100,000 lower than National's for the actual security contract period.

17/Thus, according to Sweeney's figures (which were based on information Sweeney obtained from Trudel after September 13, 1996), more than two thirds of the vandalism and thefts at the city parking garages occurred when Reliable was not on duty and there were slightly fewer than eight reported thefts or acts of vandalism per year while Reliable was on duty, or about two such acts per year per garage.

18/Sweeney also asserted to the Inspector General that Reliable's bid was non-responsive to the RFP in the manner in which its price proposal was stated and should be rejected on that basis alone. In fact, however, Reliable's price proposal was in the proper form and that submitted by National was not, as set forth above in footnote 16.

19/Pursuant to the security contract, the city agreed to pay National a total not to exceed \$783,198.30.

20/Martin did not, prior to or at the time of the award of the security contract, provide the City Council with a copy of the "Report of Awarding Authority."

21/This is not to say that an impartial awarding authority could not have made the same decision as Martin and awarded the security contract to National. It is to say, however, that in the Commission's view the expressed rationale for Martin's decision was so apparently weak as to, combined with Martin's friendship and gambling trips with Ralls and Elliott, give the appearance of being a pretext for the contract award to National.

22/Martin could have avoided violating §23(b)(3) by disclosing the relevant facts in writing to his appointing authority, the City Council, prior to his taking any official action concerning the award of the security contract to National. Martin, however, as set forth above, made no such disclosure.

23/That the Commission has imposed a substantial fine in this case is reflective of the seriousness of Martin's violation of §23(b)(3). The Commission notes that if, prior to awarding the security contract to National in September 1996, Martin had disclosed to his appointing authority (the City Council) that he was friends with the company's owners and had made gambling trips with them and that National's price proposal was not the lowest one submitted, the City Council might have decided that Martin should not participate in the contract award or have required from him a stronger justification for the award to National. Furthermore, Martin's failure to make the required disclosures, followed by the relevant circumstances subsequently becoming public in the context of the Reliable lawsuit, cast a cloud of suspicion over the security contract award and tended to undermine public confidence in the fairness of government contract awards in Lowell. In addition, Martin's actions triggered Reliable's lawsuit and led to Lowell paying Reliable nearly

\$70,000.